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Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 430.

IN THE MATTER

of

THE PETITION OF SPENCER KELLOGG & SONS, INC., AS OWNER OF THE MOTORBOAT "LINSEED KING", HER ENGINES, ETC., FOR LIMITATION OF LIABILITY, CIVIL AND MARITIME.

SPENCER KELLOGG & SON, INC.,

Petitioner,

HILDA M. HICKS, AS ADMINISTRATRIX, AND OTHERS,

Claimants-Respondents.

BRIEF ON BEHALF OF RESPONDENTS ROBERTS AND SIMS.

LESTER HAND JAYNE,

Proctor for Respondents HELEN ROBERTS, *as Administratrix, etc.*, and GENEVA SIMS, *as Administratrix, etc.*

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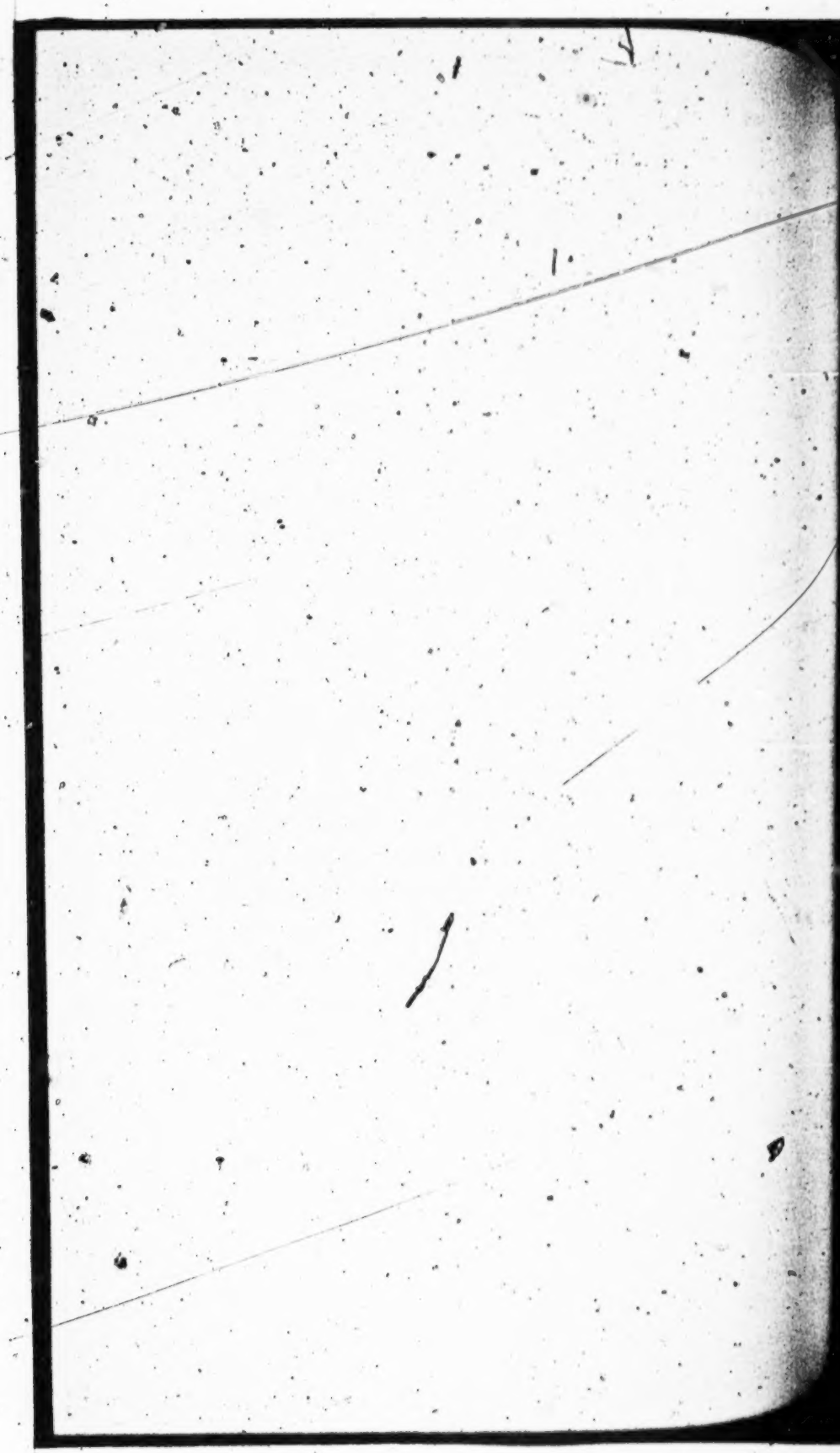

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OF
The Petition of SPENCER KELLOGG & SONS, INC., as Owner of the Motorboat "LINSEED KING", her engines, etc., for Limitation of Liability, Civil and Maritime.

SPENCER KELLOGG & SONS, INC.,
Petitioner,

HILDA M. HICKS, as Administratrix, and others,
Claimants-Respondents.

BRIEF ON BEHALF OF RESPONDENTS ROBERTS AND SIMS.

Statement.

This brief is submitted on behalf of Helen Roberts, as Administratrix, etc., and Geneva Sims, as Administratrix, etc., who respectively recovered judgments herein for the death of their intestates in this proceeding. These respondents ask that the decree of the Circuit Court, as if affects them, be affirmed.

Statement of Facts.

The respondents herein will rely on the statement of facts in the briefs submitted on behalf of claimant-respondents by Lucien V. Axtell, Esq., and Miss Elizabeth Robinson, as counsel for claimants, and the brief of Samuel B. Seidel and Sidney Newborg, Esqs., as counsel for claimants, inasmuch as nothing can be added to the summary of facts contained in these briefs.

POINT I.

The owner of the launch was negligent in causing and permitting the same to be run in the darkness in an overcrowded condition, unfit to encounter ice when the probability of ice in the river was apparent.

It is only necessary to review the testimony of the works manager of the Spencer Kellogg Company at the Edgewater plant, who was the *alter ego* of the owner, and the cross-examination of the ship owner's expert, Harvey Barrett, to establish that the works manager Stover was privy to the negligence which resulted in the disaster. Mr. Stover admitted that the mere presence of ice in the river would not absolutely deter him from the operation of the boat. He said at page 765, Vol. II, R., as to what he would do in the event of presence of ice in the river:

> "It depends on how much ice there was in connection with this one drift of ice. I would probably stop running night trips if I saw any ice."

Stover said at page 768, Vol. II, R.:

> "I was told by more experienced men that the boat was heavy enough to run in the ice."

Stover further said that he would not have laid up the boat until he personally saw ice come. He said that he knew that there was a cold spell in the early part of December. (Page 760, Vol. II, R.)

He further observed:

"You usually have a warm spell before it comes down." (Page 759, Vol. II, R.)

He was then asked at page 760, Vol. II, R.:

"Q. And in anticipation of the warm spell's effect on the ice would you have laid up the boat? A. Not until I saw ice come.

"Q. You would wait until you saw the ice? A. Yes.

"Q. At this, in spite of the fact you ran the boat nights and you knew in the morning there was no light when the boat started out? A. We might not have run nights if we heard ice was coming, or had warning."

A general reading of Stover's testimony clearly indicates that he was the man, as works manager, who dictated the time of the stopping of the boat, and although he was in this position, he confesses that the weather conditions would not deter him, but that he would wait until he personally saw the ice come, and he only admits the possibility that

"We might not have run nights if we heard ice was coming, or had warning."

Of course, there was no one sending out warnings as to the coming of ice, and the ice comes down the river silently, and there was no particular way that Stover could hear about the fact that it was coming, but when he placed himself in the position of exercising the judgment, it was then his duty to check up and determine the factors on which a sound judgment would be based. Although there had been ice in the river as far down the river as the location of the plant on the day previous, and at various places in the river for many days, and although this had been observed by many people, Stover failed to observe it. He stood on the roof of the pier

of the plant on the day preceding the accident (page [illegible], Vol. II, R.) and could see to the other side of the river where there was ice present on that day, and yet he failed to observe it. He knew that there had been cold freezing weather previous to that date, and he knew that this had been followed by a thaw, and knew that the boat was being operated in the darkness when floating ice was indiscernible, and yet the combination of these facts were of no significance to him. He proposed to wait until he himself saw ice and then he "might" have discontinued the boat service.

Stover, furthermore, knew that the boat was being operated in a greatly overcrowded condition. He had counted as many as seventy-five men coming off the boat on a single trip. (Page 776, Vol. II, R.) This was true although this was an ordinary narrow launch with seats for only thirty-six men; so that, with thirty-six men filling the entire seating capacity, there was an even greater number, or thirty-nine men, crowded into the small remaining space between the persons sitting on the seats. It is respectfully submitted that the alley-way between the seats in such a launch is provided and required for the freedom and passage of the people in the seats, in the same way as an aisle is left in a theatre for the passage of the seat occupants. It is even more necessary to have this free space in a launch of this type, travelling in an icy river, than it is to have the free space of the aisle in a building; and, yet, this space was completely jammed with passengers, so that there was no freedom of movement to any one in the cabin, whether seated or standing. The cabin, from wall to wall, was only seven feet, two inches wide, narrowing to five feet, nine inches at the aft end; so that at the after end the aisle was only one foot, eight inches in width, and, at best, the aisle was only three feet, two inches in width (page 698, Vol. II, R.) so that there were sixty-three square feet of space in the area of the aisle. (Page 699, Vol. II, R.) This is arrived at by leaving only two feet of width from the wall of the cabin for the seated passengers, including the extension of their feet upon the floor. This is the testimony

of the ship owner's boat expert, Harvey Barrett; yet, in that sixty-three square feet of space, if there were but seventy-five passengers in the boat, there were standing thirty-nine men, which is less than one and two-thirds feet of space per man. It has been established, as indicated in the other briefs, that there were even more men than this on the launch. The fact that over twenty-seven bodies remained in the cabin of the sunken launch after the disaster, and the fact that not a single passenger secured a life preserver, are significant facts as to the crowded condition of this cabin. Certainly, if this boat were unequipped with life preservers, the owners would be negligent. It was equally negligent to pack the cabin so full of human bodies that no one could reach or secure a life preserver, or even, as in the case of many of the passengers, get out of the cabin when the emergency occurred. The overcrowding of the boat in this manner was a concurrent cause of the deaths, which combined with the negligence of running the launch in the night time unfit for operation when ice was present, at a time when ice in the river was to be reasonably anticipated. The operation of the boat in the night time, with the prospect of ice in the river, was inexcusable. The overcrowding of the boat was inexcusable. The combination of the two acts of negligence was little less than wanton. The negligence of the launch owner has been found by the Trial Justice, who saw and heard the witnesses, and has been affirmed by three Circuit Court Justices on appeal. The denial of limitation of liability should be upheld.

POINT II.

The so-called "Saturday men" were not i employ of the launch owner, and are not su to the Workmen's Compensation Act of Jersey.

The respondent, Geneva Sims, as Administratrix, et resents an intestate who was one of the so-called "Sa men". The said intestate had not worked for the S Kellogg Company, and was going over to the plant hope of securing work. The fact that, in this situat was not within the scope of the Compensation Act is lished by the case of *Coco* v. *Wilbur*, 104 N. J. L. 275.

The respondent herein will rely upon the discussio authorities contained in the brief of Lucien V. Axtell and Miss Elizabeth Robinson, as proctors for the re ents, with respect to this issue.

POINT III.

Conclusion.

The decree of the Circuit Court, in so far as it denie tation, and makes awards of damages, should be af and interest directed to continue to date of payment suant to Rule 30, Subd. 4.

Respectfully submitted,

LESTER HAND JAYNE,
Proctor for Respondents, Helen R as Administratrix, etc., and Sims, as Administratrix, etc.